Re Yau Kin Mun; ex p Public Bank Bhd

HIGH COURT (IPOH) — BANKRUPTCY NO 29-209 OF 1998
CLEMENT SKINNER JC
30 APRIL 1999

Bankruptcy *— Notice — Setting aside — Notice issued based on photocopy of judgment — Photocopy of judgment certified to be true copy — Whether photocopy of judgment equivalent to 'office copy' — Bankruptcy Rules 1969 r 92(a)*

Bankruptcy *— Notice — Setting aside — Excessive interest claimed — Whether 'from the date on which the interest became due' refer to date of judgment and not date stated in judgment from which interest become payable — Whether judgment creditor claimed more than six years interest — Limitation Act 1953 s 6(3)*

Limitation *— Bankruptcy notice — Service of, whether it must be within the 12-year limitation period — Limitation Act 1953 s 6(3)*

On 28 April 1986, the respondent ('the judgment creditor') sealed an amended judgment against the appellant ('the judgment debtor') and one other person. Under the judgment, the respondent was entitled, inter alia, to be paid RM244,640.46, interest at 17.5% per annum from 15 July 1985 to the date of judgment and further interest at 8% per annum from the date of judgment to the date of realization. On 18 March 1998, the judgment creditor commenced bankruptcy proceedings by requesting for the issuance of a bankruptcy notice, attaching a photocopy of the judgment to the court registry. The notice was served on the appellant on 5 June 1998. The appellant applied to have the bankruptcy notice set aside. The application was set aside by the deputy registrar. The appellant appealed.

Held, dismissing the appeal with costs:

(1) As the copy of the judgment produced to the registry has been certified as a true copy by the senior assistant registrar of the court, it qualifies as an 'office copy' for the purpose of a request for the issue of a bankruptcy notice under r 92(a) of the Bankruptcy Rules 1969. For such a purpose, there are no provisions in the Bankruptcy Act or the Bankruptcy Rules that requires the copy of the judgment to be in accordance with s 76 of the Evidence Act 1950 (see pp 501I–502D).

(2) The judgment creditor has not claimed excessive interest. The words 'from the date on which the interest became due' in s 6(3) of the Limitation Act 1953 refer to the date of judgment (28 April 1986) and not the date stated in the judgment from which interest became payable (15 July 1985). Interest in respect of a judgment debt does not become due until a judgment is actually passed and entered (see pp 503I–504A)

(3) A bankruptcy notice issued before the expiration of the 12 years limitation period need not also be served within that period. Section 6(3) of the Limitation Act 1953 only prohibits the bringing of any action upon a judgment after the expiration of 12 years (see p 504D –E). *Re V Gopal; ex p Bank Buruh (M) Bhd* [1987]1 CLJ 602 not followed.

(4) The judgment creditor is entitled to levy execution on the judgment of 28 April 1986 without first having obtained leave as another court in earlier proceedings had held that no leave was required. The judgment debtor is bound by that earlier decision and is not allowed to relitigate the same issue in the present proceedings (see p 505E–F).

Obiter:

So long as the act of recovery is made before the expiry of the six years period, there is no prohibition to the payment of arrears of interest beyond six years from the date it became due (see p 503C–D). In this case, the act of recovery had occurred well within the six years limitation period (see p 503I–504A); *Malaysian Soil Investigation Sdn Bhd v Emko Holdings Sdn Bhd* [1994] 1 CLJ 267 followed.

[Bahasa Malaysia summary

Pada 28 April 1986, responden ('pemiutang penghakiman ') telah mendapatkan pindaan kepada perintah terhadap perayu ('penghutang penghakiman') dan juga seorang yang lain. Di bawah penghakiman tersebut, responden adalah berhak, antara lain, untuk dibayar RM244,640.46, faedah pada kadar 17.5% setahun daripada 15 Julai 1985 sehingga tarikh penghakiman dan juga faedah lanjutan pada kadar 8% setahun daripada tarikh penghakiman sehingga tarikh penyelesaian. Pada 18 Mac 1998, pemiutang penghakiman telah memulakan prosiding kebankrapan dengan memohon pengeluaran notis kebankrapan, dengan melampirkan satu salinan penghakiman kepada bahagian pendaftaran mahkamah. Notis tersebut telah diberikan kepada perayu pada 5 Jun 1998. Perayu telah memohon untuk mengketepikan notis kebankrapan tersebut. Permohonan tersebut ditolak oleh penolong kanan pendaftar. Perayu telah merayu terhadap keputusan tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Oleh kerana salinan penghakiman yang dikemukakan kepada bahagian pendaftaran telah disahkan sebagai salinan sebenar oleh penolong kanan pendaftar mahkamah, ia layak dianggap sebagai 'salinan pejabat' bagi tujuan permintaan untuk pengeluaran notis kebankrapan di bawah k 92(a) Kaedah-Kaedah Kebankrapan 1969. Bagi tujuan ini, tidak terdapat peruntukan di dalam Akta Kebankrapan atau Kaedah-kaedah Kebankrapan yang memerlukan salinan penghakiman mengikut s 76 Akta Keterangan 1950 (lihat ms 501I–502D).

(2) Pemiutang penghakiman tidak menuntut untuk faedah yang berlebihan. Perkataan 'dari tarikh di mana faedah kena dibayar' di dalam s 6(3) Akta Had Masa 1953 merujuk kepada tarikh penghakiman (28 April 1986) dan bukannnya tarikh yang dinyatakan dalam penghakiman di mana faedah kena dibayar (15 Julai 1985). Faedah berkenaan dengan hutang penghakiman tidak akan menjadi kena dibayar sehingga penghakiman telah diluluskan dan dimasukkan (lihat ms 503I–504A).

(3) Satu notis kebankrapan yang dikeluarkan sebelum tamatnya had masa 12 tahun juga tidak perlu diberikan dalam masa tersebut. Seksyen 6(3) Akta Had Masa 1953 hanya menghalang pembawaan tindakan selepas penghakiman selepas tamatnya 12 tahun (lihat ms 504D–E); *Re V Gopal; ex p Bank Buruh (M) Bhd* [1987]1 CLJ 602 tidak diikut.

(4) Pemiutang penghakiman berhak untuk melevikan pelaksanaan terhadap penghakiman pada 28 April 1986 tanpa perlu mendapatkan kebenaran kerana mahkamah lain dalam prosiding awal telah memutuskan yang kebenaran tidak diperlukan. Penghutang penghakiman adalah tertakluk kepada keputusan yang lebih awal dan tidak dibenarkan untuk melitigasikan isu yang sama dalam prosiding ini (lihat ms 505E–F).

Obiter:

Selagi tindakan mendapatkan hutang dibuat sebelum tamatnya tempoh enam tahun, tidak terdapat halangan untuk pembayaran baki faedah selepas 6 tahun dari tarikh ia menjadi kena dibayar (lihat ms 503C–D). Di dalam kes ini, tindakan mendapatkan hutang telahberlaku di dalam had masa tempoh enam tahun (lihat ms 503I–504A); *Malaysian Soil Investigation Sdn Bhd v Emko Holdings Sdn Bhd* [1994] 1 CLJ 267 diikut.]

Notes

For cases on setting aside, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1766–1785.

Cases referred to

IDE, Re; ex p IDE (1886) 17 QBD 755 (refd)
Liew Kong Ken, Re; ex p Sukorp Enterprise Sdn Bhd [1998] 1 CLJ Supp 508 (refd)
Lim Ah Hee, Re; ex p Perwira Affin Bank Bhd [1997] 4 CLJ 462 (refd)
Malaysian Soil Investigation Sdn Bhd v Emko Holdings Sdn Bhd [1994] 1 CLJ 267 (folld)
Mohd Fadzimi Yaakub, Re; ex p United Malayan Banking Corp Bhd [1998] 1 CLJ 783 (refd)
V Gopal, Re; ex p Bank Buruh (M) Bhd [1987] 1 CLJ 602 (not folld)
Wangsini Sdn Bhd (formerly known as Willway Industries Sdn Bhd) v Grand United Holdings Bhd [1998] 5 MLJ 345 (refd)
Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd [1989] 3 MLJ 508 (refd)

Legislation referred to

Bankruptcy Rules 1969 r 92(a), Form 4
Evidence Act 1950 s 76
Limitation Act 1953 s 6(3)
Rules of the High Court 1980 O 46 r 2

LH Singh (*Shivdev Singh* with him) (*LH Singh & Co*) for the judgment debtor.

Leonard Yeoh Soon Beng (*Soo Thien Ming & Nashrah*) for the judgment creditor.

Cur Adv Vult

Clement Skinner JC: This is an appeal against the decision of the learned deputy registrar who on 8 October 1998 dismissed the application of the appellant ('the judgment debtor') to set aside the bankruptcy notice herein issued at the instance of the respondent ('the judgment creditor'). The facts giving rise to this appeal are as follows.

On 28 April 1986, the judgment creditor sealed an amended judgment ('the judgment') against the judgment debtor and one other person. The judgment in its material parts reads as follows:

> ... It is this day adjudicated that the defendants do pay the plaintiff the sum of RM244,640.46 (Ringgit two hundred forty four thousand, six hundred forty and sen forty six only) with interest at the rate of 17.5% per annum from 15 July 1985 to the date of judgment and thereafter further interest at the rate of 8% per annum from the date of judgment to the date of realization and RM350 costs.

On 18 March 1998, the judgment creditor commenced these bankruptcy proceedings by issuing a bankruptcy notice based on the said judgment and requiring the judgment debtor to pay the sum of RM208,801.49 within 7 days of the receipt of the bankruptcy notice which provides full particulars of how the amount claimed is arrived at. Since the amount claimed forms a subject of complaint in this appeal, I set it out here:

BUTIR-BUTIR

1.	Wang pokok terhutang menurut Penghakiman bertarikh 28 April 1986		RM	244,640.42
2.	Campur:	Faedah pada kadar 17.5% setahun dihitung daripada 15 Julai 1985 hingga 28 April 1986 (288 hari)	RM	33,780.49
3.	Campur:	Faedah pada kadar 8.0% setahun dihitung daripada 29 April 1986 hingga 24 Oktober 1986 (179 hari)	RM	9,597.95
			RM	288,018.90
4.	Tolak:	Bayaran yang diterima pada 25 Oktober 1986	RM	130,050.00
			RM	157,968.90
5.	Campur:	Faedah pada kadar 8% setahun dihitung daripada 25 Oktober 1986 hingga 27 April 1992 (2,010 hari) untuk jumlah RM114,590.46 (No 1–No 4)	RM	50,482.59
6.	Campur:	Kos	RM	350.00
	Jumlah hutang setakat 18 Mac 1998		RM	208,801.49

Before me, Mr Lal Harcharan Singh, learned counsel for the judgment debtor argued that the bankruptcy notice should be set aside on the following grounds:

(a) the request for the issue of the bankruptcy notice (Form 4, Bankruptcy Rules) has attached to it a copy of the amended judgment dated 28 April 1986. This copy has not been certified in accordance with s 76 of the Evidence Act and therefore the bankruptcy notice issued on the strength of such a copy is bad;

(b) the judgment creditor has claimed interest for a period of more than six years. This is contrary to the provisions of s 6(3) Limitation Act 1953. In these circumstances, the bankruptcy notice is defective and must be set aside;

(c) the bankruptcy notice was served on the judgment debtor on 5 June 1998, a date after the expiry of 12 years from the date on which the judgment was sealed. Since by that date limitation had set in and the judgment had lapsed, such service is bad;

(d) in the reply stage of submissions, counsel for the judgment debtor raised a further ground namely, since more than six years had lapsed since the date on which the judgment was sealed, leave to levy execution on the judgment of 28 April 1986 as required by O 46 r 2 Rules of the High Court 1980 ('the RHC') should have been obtained before issue of the bankruptcy notice. In the absence of such leave the bankruptcy notice is bad and must be set aside.

I now consider each of these grounds.

Was the request for the issue of the bankruptcy notice made on the strength of an uncertified copy of the judgment?

As a first step in initiating bankruptcy proceedings, a judgment creditor files at the High Court registry a request in Form 4 of the Bankruptcy Rules that a bankruptcy notice be issued against the judgment debtor. Such request is made in accordance with r 92(a) of the Bankruptcy Rules 1969 which requires that the judgment creditor produce an office copy of the judgment on which the bankruptcy notice is founded. Rule 92(a) reads:

> Issue of notice
>
> When applying for the issue of a bankruptcy notice, the creditor shall —
>
> (a) produce to the Registrar an office copy of the judgment or order on which the notice is founded; ... .

It is the judgment debtor's case that simply producing a photocopy of the judgment to the registry is not enough. To enable a court to act on the request, a certified copy of the judgment must be submitted. Such certification must be done in accordance with s 76 of the Evidence Act failing which the bankruptcy notice should not be issued as an uncertified copy of a judgment is not admissible as evidence of a valid judgment entered against the judgment debtor.

This argument did not find favour with the deputy registrar who could not find any provision in the Bankruptcy Act or the Bankruptcy Rules that

requires the copy of the judgment to be certified in accordance with s 76 of the Evidence Act. In my view, the deputy registrar was correct. Rule 92(a) requires that the judgment creditor produce an 'office copy' of the judgment. There appears to be no definition of the words 'office copy' in the Bankruptcy Act or the Rules. There is however a definition of these words in *Kamus Undang-Undang* published by Penerbit Fajar Bakti Sdn Bhd (1995 Ed) as being 'a copy that is issued by the office that holds the original copy.' In the present case, I have examined the request for issue of a bankruptcy notice filed by the judgment creditor. The copy of the judgment attached to the request is a photocopy but it bears the following endorsement 'Salinan Yang Sah' with the original signature of the senior assistant registrar of the High Court, Ipoh. It is also apparent from the record that the judgment on which this bankruptcy notice is issued is a judgment of the High Court in Ipoh obtained in Suit No 1438 of 1985. In these circumtances, the original copy of the judgment must be held in this High Court registry. As the copy of the judgment produced to the registry has been certified as a true copy by the senior assistant registrar of this Court, such copy would in my judgment qualify as an 'office copy' of the judgment. I therefore find nothing irregular in the issue of the bankruptcy notice herein.

Has the judgment creditor claimed more than six years interest?

The amended judgment was sealed on 28 April 1986. It provides that the judgment sum would carry interest 'at the rate of 17.5% per annum from 15 July 1985 to the date of judgment and thereafter further interest at the rate of 8% per annum from the date of judgment to the date of realization and RM350 costs.'

Section 6(3) Limitation Act reads:

> An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

It is the submission of counsel for the judgment debtor that since the judgment specifically states that interest is payable from 15 July 1985, that is the date on which interest became due on the judgment. If that be the case, then the six years period mentioned in the second limb of s 6(3) above begins to run from 15 July 1985 and would have expired on 14 July 1991. However, as can be seen from the particulars endorsed on the bankruptcy notice, interest has been claimed up to and including 27 April 1992. Clearly, submits counsel, the amount of interest claimed in the bankruptcy notice is excessive and therefore it is defective and must be set aside.

Counsel then referred to the case of *Wangsini Sdn Bhd (formerly known as Willway Industries Sdn Bhd) v Grand United Holdings Bhd* [1998] 5 MLJ 345 where the court there held, inter alia, that for the purposes of calculating when interest begins to run on a judgment, the dates stipulated in the judgment is the date from which interest became due and therefore the six years period began to run from that date.

A Mr Leonard Yeoh learned counsel for the judgment creditor submits that the six years period is to be calculated from the date of the judgment. If his submission is accepted, the judgment creditor did not claim more interest than what it is entitled to, because the particulars endorsed on the bankruptcy notice clearly shows that what is claimed by way of interest does not exceed six years from the date of the judgment. In support of his B submission counsel cites the cases of *Malaysian Soil Investigation Sdn Bhd v Emko Holdings Sdn Bhd* [1994] 1 CLJ 267 where it was held that s 6(3) of Limitation Act did not prohibit the payment of arrears of interest due on a judgment beyond the six years after they became due as long as the act of recovery is made before the expiry of the six years period; and *Re Lim Ah* C *Hee, ex p Perwira Affin Bank Bhd* [1997] 4 CLJ 462 which followed the decision in *Malaysian Soil Investigation Sdn Bhd v Emko Holdings Sdn Bhd.*

I must with respect say that I concur with the decision in *Malaysia Soil Investigation Sdn Bhd* and *Re Lim Ah Hee* on the interpretation they put on the second limb of s 6(3) of the Limitation Act, namely, so long as the act of recovery is made before the expiry of the six years period, there is no D prohibition to the payment of arrears of interest beyond six years from the date it became due. However, with regard to the submission of counsel for the judgment debtor that the six years is to run from the date on which the judgment states the interest becomes payable, which in this case is 15 July 1985, I regret I do not agree with that submission. It is my view that for the purpose of determining the six years period of limitation under the second E limb of s 6(3), that period is to be calculated from the date of judgment and not from the date the interest becomes payable. In my judgment, the words 'from the date on which the interest became due' must refer to the date of judgment and not the date stated in the judgment from which interest became payable because interest in respect of a judgment debt does not F become due until a judgment is actually passed and entered. It is only from that date that the right to be paid interest on the judgment debt arises. Therefore, notwithstanding that a judgment may speak of interest becoming payable from a date earlier than the judgment date, for the purpose of determining the limitation period, it is from the date of the judgment that the six years begins to run since that is the date when interest G became due on the judgment debt.

It is my view that if the six years is to be calculated from the date suggested by counsel for the judgment debtor, namely, from the date on which the interest is stated in the judgment to be payable from, it could lead to possible injustice where, for example, a plaintiff in bringing an action H prays for interest on the judgment debt from the date on which he files his action, but is then delayed for some reason or other from finally sealing a judgment until some 6 years later. If the 6 years is to be calculated from the date the interest becomes payable, he will not be able to recover any interest on his judgment debt as by then it will be caught by the second limb in s 6 (3).

I It follows from what I have said that I do not consider the amount of interest claimed in the bankruptcy notice to be excessive because applying the decision in the *Malaysian Soil Investigation* case, the act of recovery

occured well within the six years period and secondly, if the six years is calculated from the date of judgment, the amount of arrears of interest claimed did not exceed six years.

Must the Bankruptcy Notice be served within the 12 years limitation period?

It is the contention of the judgment debtor that once 12 years have lapsed from the date of judgment, the judgment is a dead letter. Therefore, if bankruptcy proceedings are to be taken on a judgment, it is counsel's submission that not only must the bankruptcy notice be issued but it must also be served within the 12 years period. In support of his contention, counsel relies upon the decision in *Re V Gopal, ex p Bank Buruh Bhd* [1987] 1 CLJ 602, where it was held that for the purposes of determining whether or not six years had elapsed since the obtaining of judgment so as to ascertain whether leave to execute the judgment was required under O 46 r 2 RHC, the relevant date is the date of service of the bankruptcy notice.

In our present case, the bankruptcy notice was issued on 18 March 1998, which was slightly more than a month before the 12 years limitation period set in. It is counsel's submission that the bankruptcy notice had to be served before 27 April 1998 because after that date, its foundation is gone as the judgment on which it is based no longer exists for all intents and purposes. I regret I do not agree with this submission. Firstly, s 6(3) Limitation Act only prohibits the bringing of any action upon a judgment *after* the expiration of twelve years. Therefore, to suggest that a bankruptcy notice issued before the limitation period must also be served within the 12 years is to read into s 6(3) a provision which is not there. I see no justification for so doing. Secondly, in the case of *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* [1989] 3 MLJ 508, Edgar Joseph J (as he then was) carefully explained why the decision in *Re V Gopal* regarding the material time from which to calculate the six years period after a judgment had been entered could not be followed. His lordship pointed out that the learned judge in that case had misread the decision of the English Court of Appeal in *Re IDE, ex p IDE* (1886) 17 QBD 755 and went on to say that in principle it was fairer to calculate the six years from the date of issue of a bankruptcy notice rather than the date of its service because delays in effecting service are often not the fault of the creditor and indeed could well be because the debtor is deliberately avoiding service.

For the above reason I find no merit in the submission of the judgment debtor on this point.

Was leave of court necessary to levy execution pursuant to O 46 r 2 RHC 1980 before issue of the bankruptcy notice?

As indicated earlier, when replying to submissions of the judgment creditor, counsel for the judgment debtor raised for the first time the objection that as the amended judgment on which the bankruptcy notice is based was obtained on 28 April 1986 and the bankruptcy notice herein was issued on 18 March 1998, well over six years had elapsed since the date of the judgment. In these circumstances, leave to levy execution on the judgment

should have been obtained pursuant to O 46 r 2 RHC failing which the judgment upon which the bankruptcy notice is based cannot be described as being a final judgment where-on execution had not been stayed. If execution cannot issue on the judgment, no bankruptcy notice can issue also on that judgment. Counsel for the judgment debtor relies on the decision in *Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd* as well as the following High Court decisions which followed that decision, namely, *Re Mohd Fadzimi Yaakub, ex p United Malayan Banking Corp Bhd* [1998] 1 CLJ 783, *Re Liew Kong Ken, ex p Sukorp Enterprise Sdn Bhd* [1998] 1 CLJ 508 and a decision of this court in Ipoh High Court BP No 29-350-98.

Learned counsel for the judgment creditor does not deny that no leave has been obtained to levy execution on the judgment but submitted that there had been earlier bankruptcy proceedings between the judgment creditor and judgment debtor in the High Court in Ipoh in BP No 29-267-96. In those earlier proceedings, the judgment debtor raised the issue of leave to execute pursuant to O 46 r 2 but failed in their argument as the learned judge there held that no leave was required. Learned counsel then produced a copy of the decision in BP No 29-267-96. Counsel explains that armed with such decision in their favour and relying on the same, the judgment creditor issued the present bankruptcy notice without having obtained leave. Counsel says he is entitled to assert that judgment in these proceedings. Counsel also points out that the judgment creditor would be gravely prejudiced if this issue were allowed to be raised now at such a late stage since the limitation period of 12 years would have set in and it would be too late to commence fresh bankruptcy proceedings.

Having given this matter considerable thought, I find that is not open to the judgment debtor to raise the question of leave here. Having raised this same issue in earlier bankruptcy proceedings between the same parties before another court and having failed there, the judgement debtor is bound by that earlier decision and cannot be allowed to relitigate that very same issue here.

In the result, this appeal is dismissed with costs.

Appeal dismissed with costs.

Reported by Joel Ng